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CHONG KIEN YONG
v. TAN CHONG EKSPRES AUTO SERVIS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ARZIAH MOHAMED APANDI JC
[CIVIL APPEAL NO: WA-11BNCVC-78-11-2023]
B 9 JULY 2024

Abstract – *(i) An insurer has the right of subrogation, which allows it to step into the shoes of the insured and claim against a third party who caused the loss. This right is not affected by a settlement between the insured and the third party; (ii) A contract of bailment arises when one person (bailor) delivers goods to another (bailee) for a purpose, with the understanding that the goods will be returned or disposed of as agreed. In a bailment relationship, the bailee has a duty of care to ensure that the bailed goods are returned in the same condition as when they were delivered, or in a better condition. This duty extends to taking reasonable steps to prevent damage or loss, even due to accidental causes. If a bailee fails to exercise reasonable care and the bailed goods are damaged or lost, the bailee is liable to the bailor or the insurer who has stepped into the bailor's shoes through subrogation.*

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INSURANCE: *Claim – Subrogation – Car owner/insured sent motorcar for repair at workshop – Fire occurred at workshop and car owner's car declared as total loss – Car owner incurred losses – Car owner claimed under insurance policy and paid by insurer – Car owner compensated by workshop – Insurer commenced action based on subrogation against workshop – Whether subrogation claim valid – Whether car owner had locus standi to commence proceedings – Whether there was right of subrogation to insurer – Whether car owner waived any claims against workshop having entered into settlement and receiving compensation*

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G ***CONTRACT:*** *Bailment – Bailment contract – Car owner/insured sent motorcar for repair at workshop – Fire occurred at workshop and car owner's car declared as total loss – Car owner incurred losses – Whether there was bailment contract – Whether there was bailor-bailee relationship between parties – Whether workshop owed duty of care as bailee – Whether workshop, as bailee, had dispensed duty of care in taking all reasonable and/or precautionary steps to prevent fire from spreading to premises to salvage vehicles – Contracts Act 1950, ss. 101, 102, 104, 105, 113 & 114*

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The appellant had sent his motorcar for repair at the respondent's workshop. A fire broke out in the area involving some business premises, including the respondent's workshop. The fire was classified as accidental and the appellant's motorcar was declared a total loss; the appellant incurred losses of RM72,394.50. The appellant's motorcar was insured with Progressive Insurance Berhad ('PIB'). The appellant then claimed losses from PIB and

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was accordingly paid by the same. He was also compensated by the respondent. PIB, in an action based on subrogation at the Magistrates' Court, claimed for the amount of RM72,394 against the respondent. It was submitted that the respondent, *inter alia*, (i) failed in its duties under the bailment contract between the parties to ensure the appellant's motorcar was returned in a good condition; and (ii) was negligent in failing to ensure that the vehicles on the premises were in a good and secure condition and in failing to practice the obligatory responsibility to ensure the appellant's motorcar was placed in a good and safe place. Resisting the claim, the respondent argued that, *inter alia*, (i) the appellant did not have *locus standi* to commence the proceedings because there was no right of subrogation to PIB as his motorcar was under a hire-purchase agreement ('HPA') with TC Capital Resources Sdn Bhd ('TCC'); (ii) the appellant had settled the matter with the respondent, where he claimed his insurance and accepted the sum of RM3,000 in full and final settlement of all claims. The appellant had also agreed that he had no claim whatsoever against the respondent. Due to the settlement, the appellant waived any claims and agreed not to make any claim against the respondent. Therefore, the appellant had no claim against the respondent and had no right to give any rights to PIB. The alleged subrogation claim by PIB was invalid; (iii) no bailment contract existed between the appellant and the respondent. There was no claim by the appellant against the respondent on the alleged contract of bailment by the appellant; and (iv) the respondent was not negligent and the fire that had occurred was not due to the respondent as the appellant agreed that it was an accidental fire. The principles of *res ipsa loquitor*, according to the respondent, were inapplicable. Despite making a finding of fact and law that there was subrogation, the Magistrate dismissed the appellant's claim as the latter had accepted the settlement sum from the respondent. The Magistrate, however, did not rule on the determination of contract of bailment. Hence, the present appeal. The issues that arose for determination were: (i) whether there was subrogation; and (ii) whether there was a bailment contract between the parties.

Held (allowing appeal with costs):

(1) The respondent argued that (i) the appellant did not specifically plead on subrogation when there was no mention of the terms and conditions of the HPA between TCC and the appellant; and (ii) Edaran Tan Chong Motor ('ETCM') did not prove any hire-purchase facilities to the appellant and therefore, there was no proof of the HPA status. The arguments were misconceived. The appellant had pleaded subrogation and PIB had lawfully stepped into the appellant's shoes to claim for his losses from the respondent. The respondent misunderstood the laws on subrogation and HPA. Once the appellant entered into the HPA with TCC, his motorcar financier, any contractual relationship between the appellant and ETCM, his motorcar dealer, was extinguished; the legal effect of which was that the appellant had no claim against ETCM as

there was no contractual relationship between him and ETCM. The claim was by PIB, *ie*, the appellant's insurer, against the respondent under the insurance laws through subrogation for damages paid by the insurer to its insured to be repaid by the tortfeasor concerned, *ie*, the respondent. An insured brings an action against the wrongdoer. The insurer's right of subrogation enables it to exercise the insured's rights against third parties. It was not the duty of the financier to initiate claims for insurance coverage or ensure his motorcar was insured against risk. It was the appellant's duty as the owner of his motorcar, which the appellant had subrogated his rights for his insurer to take legal action against the respondent. The *locus standi* was now with the appellant. It was not befitting for the respondent to argue that the appellant did not particularise his claim under subrogation in his statement of claim as he was not required to do so. Furthermore, the settlement did not remove the appellant's subrogation rights. (paras 13-16, 19-20, 23 & 26)

(2) The police report by the respondent's manager reported that the appellant's motorcar was one of the burnt vehicles at the premises. Evidence showed that the appellant's motorcar was at the premises before the fire. When the appellant's motorcar was sent to the premises for service or repairs, it was handed over to the respondent for actions to be taken by the respondent on his motorcar. A contract of bailment existed since the parties' conduct mirrored that of a bailment. A bailment is a delivery of goods by one person to another for some purpose upon a contract that they shall be returned or disposed of when the purpose is accomplished. The person delivering the goods is the bailor and the person to whom they are delivered is the bailee. The governing laws on bailment would be the Contracts Act 1950 ('Act'), particularly s. 101 which defines bailment, bailor and bailee. The existence of a bailment contract between the parties rendered the respondent a bailee owing a duty of care for the appellant's motorcar at the premises. The motorcar would not have suffered a total loss without the accidental fire. If the respondent had exercised a reasonable duty of care to the motorcars at the premises, including the appellant's motorcar, the motorcars could have been salvaged. There was no proof to show that the respondent had dispensed its duty of care in taking all reasonable and/or precautionary steps to prevent the fire from spreading to the premises to salvage the vehicles. Sections 104 and 105 of the Act mandated the respondent to take as much care of the motorcar, *ie*, the bailed good, where the respondent would not be responsible for the loss of the thing bailed if the respondent had taken the amount of care of the motorcar. Thus, the respondent, as bailee, had a duty of care to ensure the good surrendered by the bailor, the appellant, was returned to the appellant like before. Despite the accidental fire, the respondent's duty

was not discharged but remained to ensure that the appellant's motorcar was saved so that it could be brought back to him in the same condition as before, if not better, with the scheduled repairs. (paras 30, 36 & 37)

(3) Since the respondent failed to return the motorcar, the respondent was obligated, under subrogation, to pay back the appellant's insurer, to indemnify by paying back the total loss of his motorcar of RM72,000, together with all incidental expenses of RM394.50 costs of adjuster's fee. (para 40)

Case(s) referred to:

Ahmad Ismail v. Malaya Motor Co & Anor [1973] CLJU 1; [1973] 1 LNS 1 FC ***(refd)***
Allianz General Insurance Company (Malaysia) Bhd & Anor v. Fuji Logistics (M) Sdn Bhd & Anor [2021] CLJU 1913; [2021] 1 LNS 1913 HC ***(refd)***
BMW Credits (M) Sdn Bhd v. Learsim Sdn Bhd & Anor [2022] CLJU 2362; [2022] 1 LNS 2362 HC ***(refd)***
China Insurance Co Ltd v. Ang Bay Kang [1968] CLJU 22; [1968] 1 LNS 22 FC ***(refd)***
Coggs v. Bernard (1703) 2 Ld Raym 909 ***(refd)***
Dato' Othman Hashim v. KKW Auto Centre [2012] 5 MLJ 756 ***(refd)***
Economic Transport Organization v. Charan Spinning Mills (P) Ltd [2010] 3 MLJ 1347 ***(refd)***
Ganda Edible Oils Bhd v. Aik Heng Hung Sdn Bhd [1983] 2 CLJ 261; [1983] CLJ (Rep) 562 HC ***(refd)***
Hall & Long v. The Railroad Companies (1871) Supreme Court of the United States, 13 Wall 367 ***(refd)***
Hobbs v. Marlowe (1978) AC 16 ***(refd)***
Kementerian Pertahanan Malaysia & Anor v. Malaysia International Shipping Corporation Bhd & Ors [2007] 4 CLJ 820 CA ***(refd)***
Mobile And Montgomery Railway Company v. LC Jurey And M Gillis, Partners as Jurey & Gillis, for the Use of the Factors' & Traders' Insurance Company of New Orleans (1883) United States Supreme Court Reports 28 ***(refd)***
Mohd Yahya Nordin v. Ooi Chong Seong [2022] 1 LNS 314 HC ***(refd)***
Newfield Peninsula Malaysia Inc v. The Owners Of The Ship Or Vessel 'Tanjung Pinang 1' [2012] CLJU 1084; [2012] 1 LNS 1084 HC ***(refd)***
Ong Siew Hwa v. UMW Toyota Motor Sdn Bhd [2018] 8 CLJ 145 FC ***(refd)***
Rafiah A Bakar v. East West-UMI Insurance Bhd [1993] 1 CLJ 431 HC ***(refd)***
Teoh Kim Kien & Ors v. Lai Sen & Anor [1980] CLJU 80; [1980] 1 LNS 80 FC ***(refd)***
Tiong Nam Trading & Transport (M) Sdn Bhd v. Commercial Union Assurance (Malaysia) Sdn Bhd [2008] 6 CLJ 160 CA ***(refd)***
Yorkshire Insurance Co Ltd v. Nisbet Shipping Co Ltd [1962] 2 QB 330 ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 101, 102, 104, 105, 113, 114
Evidence Act 1950, ss. 101, 114(g)

For the appellant - Rebekah Arputha Malar Nhanam; M/s Suat Lim & Co
For the respondent - Deborah Jaswinder Kaur Sher Singh; M/s Soraya Jabid, Deborah & Co

[Editor's note: Appeal from Magistrates' Court; Civil Suit No: WA-172NCVC-4418-07-2021.]

Reported by Najib Tamby

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JUDGMENT

Arziah Mohamed Apandi JC:

Introduction

B **[1]** In the usual walks of life, the appellant sends his motorcar for repair at the car maker's workshop as his insurance policy covers the repair due to accidents. It never occurred to the appellant that it became a double whammy when his motorcar became beyond repair at the same workshop instead of being repaired. His motorcar was declared a total loss due to the accidental fire ignited at a nearby premise, which spread all over.

C **[2]** As with other reasonable men, the appellant would claim losses from his insurer due to the total loss of his motorcar. The appellant was paid by his insurer and compensated by the workshop for losing his motorcar. The appellant's insurer would claim against the workshop as the tortfeasor for the payment made to the appellant under the subrogation laws. However, the D workshop refused to reimburse the insurer since the appellant made and accepted compensation. Hence, this action is in court.

[3] In stepping into the shoes of the appellant under the law of subrogation, the appellant's insurer filed this action for reimbursement of E payment from the respondent (through its insurer). The existence of a bailee-bailor relationship between parties was claimed to have been created upon handing over his motorcar at the workshop. The appellant claimed RM72,394.50 for the total loss value of his motorcar, and a notice of subrogation was issued. The dispute arose when the appellant had also signed an acceptance of payment of RM3,000 from the respondent for the total loss F of his motorcar.

[4] The learned Magistrate ("LM") dismissed the appellant's claim. Although the LM made a finding of fact and law, there is subrogation, but because the appellant accepted the settlement sum from the respondent, his claim was rejected. The LM did not rule on the determination of a contract G of bailment.

Background Facts

[5] The appellant has Progressive Insurance Berhad ("progressive insurance") insurance for his motorcar with registration No. VAH6342 H ("his motorcar"). The appellant, being the owner of his motorcar, sent it to the respondent's premise at TCEAS-Balakong (Relocation) at Lot 15A, Jalan Satu, Cheras Jaya Industrial Estate in Balakong, Selangor ("the premise"), for service where:

I (i) on 29 March 2018, at about 4am, a fire occurred, which was reported that several premises had burnt, and Ismail bin Samsudin lodged a police report;

(ii) by the report on the cause of fire dated 17 April 2018, it is stated that the source of the fire was resistance heating and it was an "accidental fire";

(iii) the respondent had breached the contractual obligation of bailment as the respondent was responsible for ensuring that his motorcar was returned to the appellant in good condition;

(iv) the respondent had a "fire policy" with Lonpac Insurance Bhd;

(v) the appellant lodged a police report on 16 October 2020, in respect of the fire as mentioned earlier that occurred;

(vi) the respondent was negligent in taking care of his motorcar and *res ipsa loquitor* is applicable;

(vii) the appellant incurred a loss of RM72,394.50;

(viii) Progressive Insurance has the right to all the rights of the appellant and has used the appellant's name to enforce the appellant's rights against a third party; and

(ix) progressive insurance, in an action based on subrogation, has claimed RM72,394 against the respondent for the loss of RM72,000 and payment of the adjuster's fee in the sum of RM394.50.

Pleadings

[6] The statement of claim dated 13 July 2021 ("SOC") stated that:

(i) the fire broke out in the area involving some business premises, including the respondent's workshop, which is the premises. The police report by the respondent's head workshop stated that the rear section of the insurance claim, office section, car service area, and some cars and factory equipment were burnt, including some customer vehicles, including his motorcar. The report on the cause of the fire, dated 17 April 2018, found the cause was the source of ignition resistance heating at the light capacitor high-bay, leading to the capacitor melting and burning the fuel load underneath. The fire was classified as accidental;

(ii) the respondent failed in its duties under the bailment contract between parties to ensure that his motorcar was returned in good condition;

(iii) the respondent's fire policy insurance No. W/18/FF20/821211/KUL-21 was lodged with Lonpac Insurance Berhad for the premises from 1 January 2018 until 31 December 2018. The policy covered insurable matters, including Item No. 0003-On Customers' Vehicles and Goods held in trust or commission;

(iv) the appellant's police report was made on 16 October 2020, describing the fire accident and his losses beyond economical repair and total loss. The losses claimed were based on the respondent's negligence in failing to ensure that the vehicles on the premise were in a good and secure condition, in failing to ensure his motorcar was returned in a good and secure condition and in failing to practice the obligatory responsibility to ensure his motorcar is placed in a good and safe place; and

(v) the losses were RM72,394.50. It was also pleaded on *res ipsa loquitor* that the damages would not have occurred if not for the negligence and/or failure of the respondent, who had custody and/or control over the premise. It is a term in the insurance policy that progressive insurance is entitled to all the rights of the plaintiff and use the plaintiff's name to enforce any of the plaintiff's rights against a third party that arose from/or as a result of any property damage and/or loss. Based on the policy term, Progressive Insurance had paid RM72,394.50 as a full settlement towards the plaintiff due to the total loss of his motorcar beyond economic loss in the fire accident. Therefore, through this subrogation, Progressive Insurance claims from the respondent that the RM72,394.50 was the total loss of his motorcar.

[7] The statement of defence dated 23 September 2021 ("SOD") stated that:

(i) the appellant does not have *locus standi* in fact and in law to commence the proceedings because there is no right of subrogation to Progressive Insurance as his motorcar was under a hire purchase agreement ("HPA") with TC Capital Resources Sdn Bhd ("TC Capital");

(ii) the appellant had decided to claim on his insurance, as it was on an "agreed value", which would be on a higher value and not on "market value";

(iii) the appellant settled the matter with the respondent, where he would claim his insurance and accepted the sum of RM3,000 in "full and final settlement" of all claims. Further, the appellant had agreed that the appellant had no claim whatsoever against the respondent;

(iv) because of the settlement, the appellant waived any claims and agreed not to make any claim against the respondent. Therefore, the appellant has no claim in fact and law against the respondent. The appellant has no right to give any rights to Progressive Insurance. The alleged subrogation claim by Progressive Insurance is invalid, as the appellant had no rights. As such, the appellant cannot pass any rights to Progressive Insurance;

(v) no bailment contract existed between the appellant and the respondent. There is no claim by the appellant against the respondent on the alleged contract of bailment by the appellant; and

(vi) the respondent was not negligent at all material times, and the fire that occurred was not due to the respondent, as the appellant agreed and admitted that it was an "accidental fire." The principles of *res ipsa loquitor* are inapplicable.

Arguments

[8] The respondent submitted that:

(i) the appellant had no *locus standi* to commence the action because his claim on subrogation is invalid in fact and law and also because there is no contract of bailment between the parties;

(ii) since the fire was accidental, there was no negligence by the respondent; and

(iii) there was a complete and final settlement between the parties where the appellant settled the matter and, as such, has no rights under the law to claim in the action.

Evidence In Trial

[9] After analysing the evidence presented through five witnesses of the appellant and four of the respondent, the LM made the finding of fact and law that there is a cause of action by the appellant against the respondent under the laws of subrogation. In her grounds of judgment ("GOJ"), the LM found that progressive insurance could rely on the discharge and subrogation form and use the appellant's name to enforce any of the appellant's rights against third parties.

[10] However, the LM did not make any finding on a bailment contract between the parties. The appellant failed to prove the respondent's negligence in the accidental fire ignited at a nearby factory rapidly spreading to the premise (see encl. 11 p. 27).

[11] The LM was satisfied that the appellant signed the settlement letter dated 18 September 2018 on 19 September 2018 without admission to liability. As a goodwill gesture, the respondent paid the appellant RM3,000 as full and final compensation. The LM assessed the appellant's demeanour, and the LM could not consider SP5's conduct, which looked like he did not know of the existence of the settlement letter that he admitted to signing. SP5 also said he did not understand the contents of the settlement letter as it was in English; and the LM found SP5 a witness of no credibility. The LM rejected the appellant's challenge on the settlement letter. The LM found that the appellant had received the total and final compensation where the

appellant "shall have no claim or entitlement whatsoever towards any insurance claim received" by the respondent's insurer for his motorcar. It meant the appellant had no rights to claim against the respondent or the respondent's insurance for any losses suffered relating to his motorcar (see encl. 11 pp. 30 to 31). The LM found that the appellant failed to prove his case because the appellant was bound by the settlement letter he signed with the respondent.

Issues Of The Appeal

[12] The issues are whether there is a cause of action in subrogation and, if so, whether the appellant can prove the existence of a bailment contract to prove the respondent's negligence.

Whether There Is Subrogation?

[13] The respondent argued that the appellant did not specifically plead on subrogation when there was no mention of the terms and conditions of the HPA between TC Capital Resources and the appellant. It was never pleaded with the consent to commence an action against the respondent (see encl. 7 p. 433). The HPA showed that TC Capital was the owner and the appellant was the hirer. This indicates that the appellant has no right to commence the action without consent from TC Capital (referring to *BMW Credits (M) Sdn Bhd v. Learsim Sdn Bhd & Anor* [2022] CLJU 2362; [2022] 1 LNS 2362). The appellant's witness SP4 stated that TC Capital, the financier to the hire-purchase taken by the appellant in purchasing his motorcar, becomes the owner, and the appellant is the hirer who took up the loan facilities.

[14] The authorisation to Edaran Tan Chong Motor ("ETCM") to settle the hire-purchase loan balance is a blank document with no particulars (see encl. 7 p. 447). ETCM Tan Chong did not prove any hire-purchase facilities to the appellant. There is no proof of the HPA status. The appellant did not subpoena any witnesses from TC Capital, and the appellant's evidence did not mention the HPA status. The appellant did not explain why he did not bring anyone from TC Capital as the appellant's witness. The respondent submitted that the presumption under s. 114(g) of the Evidence Act 1950 ("EA 1950") should be invoked for failure to adduce the evidence about the HPA status (see: *Mohd Yahya Nordin v. Ooi Chong Seong* [2022] 1 LNS 314).

[15] With due respect, the arguments are misconceived. The appellant had pleaded subrogation, and progressive insurance has lawfully stepped into the appellant's shoes to claim for his losses from the respondent. The respondent misunderstood the laws on subrogation and HPA. Once the appellant entered into the HPA with TC Capital (his motorcar financier), any contractual relationship between the appellant and ETCM (his motorcar dealer) was extinguished (see: *Ahmad Ismail v. Malaya Motor Co & Anor* [1973] CLJU 1 [1973] 1 LNS 1; [1973] 2 MLJ 66); the legal effect of which is that the

appellant has no claim against ETCM as there is no contractual relationship between him and ETCM (see: *Ong Siew Hwa v. UMW Toyota Motor Sdn Bhd* [2018] 8 CLJ 145; [2018] 5 MLJ 281).

[16] The claim is by the appellant's insurance (Progressive Insurance) against the respondent under the insurance laws through subrogation for damages paid by the insurer to its insured to be repaid by the tortfeasor concerned, *ie*, the respondent. An insured brings an action against the wrongdoer. It relates to insurance contracts originating from common law with implied contract terms and equity. Its auxiliary jurisdiction was needed to compel the assured to lend his name to the insurer for the enforcement of rights and remedies to which his insurer was subrogated (see: *Yorkshire Insurance Co Ltd v. Nisbet Shipping Co Ltd* [1962] 2 QB 330).

[17] It is a matter of express contractual provisions (see: *Teo Kim Kien & Ors v. Lai Sen & Anor* [1980] CLJU 80; [1980] 1 LNS 80; [1980] 2 MLJ 125). Subrogation in common law ensures the insurer takes the insured's place once having indemnified the insured victim and takes over the insured victim's right of recovery against the party who has caused him injury or damage (see: *Ganda Edible Oils Bhd v. Aik Heng Hung Sdn Bhd* [1983] 2 CLJ 261; [1983] CLJ (Rep) 562). This principle of indemnity prevents the policyholder from recovering a more significant amount than his or her loss. The tenets of contribution require that insurers shall only be liable to contribute their proportion of the total loss and nothing more to safeguard the principle of indemnity.

[18] The essential ingredients of subrogation were summarised in *Allianz General Insurance Company (Malaysia) Bhd & Anor v. Fuji Logistics (M) Sdn Bhd & Anor* [2021] CLJU 1913; [2021] 1 LNS 1913; [2021] MLJU 2270 as:

(i) there exists a policy of insurance covering a specific subject matter;

(ii) the insurer has indemnified its insured for the damage covered by the insurance policy caused by the fault of another party;

(iii) the insurer brings the action against the party at fault in its name and the insured; and

(iv) the cause of action pleaded is that of the insured against the party at fault.

[19] The insurer's right of subrogation enables it to exercise the insured's rights against third parties. If the insured himself causes a loss (which is not the case here), the insurer is not entitled to subrogation simply because the insured has no rights against himself (see: *Dato' Othman Hashim v. KKW Auto Centre* [2012] 5 MLJ 756).

[20] Before filing this action, the appellant settled all payments due and owing to TC Capital. The payment voucher from progressive insurance to TC Capital (exh. P-8) and discharge voucher/letter of subrogation (exh. P7)

proved the settlement, and a subrogation notice was issued to the respondent. The appellant proved to have subrogated his right to claim from the respondent upon such settlement to TC Capital. SP4 acknowledged this. Undoubtedly, the appellant is the driver and owner of his motorcar. It is not the duty of the financier to initiate claims for insurance coverage or ensure his motorcar is insured against risk. It is the appellant's duty as owner of his motorcar which the appellant has subrogated his rights as owner of his motorcar for his insurer to take legal action against the respondent on behalf of the appellant's insurer under the principles of subrogation. The *locus standi* now is with the appellant. The LM made the correct finding of fact and law that subrogation existed as a valid cause of action against the respondent. The principle of subrogation allows the appellant's insurer to step into the appellant's shoes to entitle all rights and remedies that the appellant's insurer possesses against third parties.

[21] I am reminded of the judgment of Her Ladyship Zaleha Zahari, JCA (as she then was) in *Kementerian Pertahanan Malaysia & Anor v. Malaysia International Shipping Corporation Bhd & Ors* [2007] 4 CLJ 820; [2007] 5 MLJ 393 which held that:

> [7] ... 'Subrogation' is concerned with the mutual rights and liabilities of parties to a contract of insurance. Pursuant to a contract of insurance, where an insurer indemnifies an assured for a loss, *he is entitled to 'stand in the shoes' of the assured and to receive the benefit of all of the rights and remedies which the assured may have against third parties in respect of such loss* (Insurance Law in Australia, Kenneth Sutton; *Castellain v. Preston* [1883] Vol IX QBD 380). This right is inherent in a contract of indemnity. It does not depend for its existence upon the occurrence of a loss under the policy but its exercise is of course dependent upon the payment of the loss. But as a right, it exists from the moment of the making of the contract of indemnity (see *State Government Insurance Office v Brisbane Stevedoring Pty Ltd* [1969] 123 CLR 228 at p 240, per Berwick C.J.].
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> [8] *The cause of action in such cases at all times lies with the assured. Other than the assured, no one else can institute any remedy. As against the wrongdoer the insurer has no cause of action of his own* (*Hobbs v. Marlowe* [1978] AC 16 at p 37). *The assured must bring an action against the wrongdoer if he is called upon by his insurer to do so and is indemnified against the costs, but it is the assured's cause of action, not that of the insurer, that he sues on. The assured, is a nominal Plaintiff.* The real plaintiff is the subrogated insurer as they are the one instructing solicitors, paying for the action, and the person to benefit from the action, and to lose by the action, if it is lost. Should an action be instituted against a third party, the third party's rights remain exactly the same whether he is being sued by the insurer or the assured.
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> (emphasis added)

[22] In Lord Diplock's judgment of the House of Lords in *Hobbs v. Marlowe* (1978) AC 16 at p. 37 HL it was held that:

> My Lords, I take it to *be clear beyond all argument that an assured under a policy insuring him against loss or damage to a chattel, on being indemnified by his insurers fora loss he has sustained, does not thereby lose his right of action against the wrongdoer who caused the loss*. Under the doctrine of subrogation he must bring an action against the wrongdoer if he is called on by his insurer to do so and is indemnified against the costs; *but it is his own cause of action, not that of his insurer, that he sues on; as against the wrongdoer the insurer has no cause of action of his own*.
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> [17] Though in *Newfield Peninsula Malaysia Inc v. The Owners of the Ship or Vessel "Tanjung Pinang 1"* [2013] 1 AMCR 718; [2013] 10 MLJ 650, it was held that the fact that the claim is brought under subrogation need not be pleaded, in my judgment, the action must still be brought in the name of the insured and not the insurer as in its own right.
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> (emphasis added)

[23] It is not befitting for the respondent to argue that the appellant did not particularise his claim under subrogation in the SOC as the appellant is not required to do so. Here, the insurer of the appellant has paid for the loss and damage under the insurance policy, thus under the principles of subrogation, the insurer is entitled to the benefit of any recovery from the cause of action relating to the loss or damage (see: *Newfield Peninsula Malaysia Inc v The Owners Of The Ship Or Vessel 'Tanjung Pinang 1'* [2012] CLJU 1084; [2012] 1 LNS 1084; [2013] 10 MLJ 650). Under subrogation, the appellant need not prove the sums claimed, including the damage due to the accident of RM72,000 and the adjuster fee payment of RM394.50 and the tax invoice (marked ID-4).

[24] Similarly, Her Ladyship Nallini Pathamanathan J (as she then was) in the *Newfield Peninsula* case (*supra*) amplified that the equitable doctrine of subrogation requires the insured to pursue recovery. It is a matter between the insurer and the insured and does not encompass the third-party wrongdoer. The insured (the appellant) invokes his cause of action against the wrongdoer (the respondent), *albeit* in tort, contract, or other suitable cause of action. The insurer himself has no cause of action against the wrongdoer (see: *Teoh Kim Kien & Ors v. Lai Sen & Anor* [1980] CLJU 80; [1980] 1 LNS 80; [1980] 2 MLJ 125 FC that endorsed Lord Diplock in *Hobbs v. Marlowe* (1978) AC 16 Lord Diplock in *Hobbs v. Marlowe* (1978) AC 16. Subrogation is an action by the insured to the insurer of the right of such action against the wrongdoer (see: *Rafiah A Bakar v. East West-UMI Insurance Bhd* [1993] 1 CLJ 431; [1993] 1 MLJ 39 and *Bullen & Leake & Jacob's Malaysian Precedents of Pleadings*, paras. 17.20 to 17.22).

[25] The other respondent's argument is the fact that the appellant had accepted (on 19 September 2018) the settlement sum in the settlement letter dated 18 September 2018 with the respondent (exh. D11), whereby the settlement confirmed the repair order and inspection done by the adjuster on 28 March 2018 and declared his motorcar was damaged beyond economical repair (exh. D13). The vehicle damages inspection report (adjuster report) is exh. P3. The settlement confirmed that as a gesture of goodwill and without admission of liability, the appellant and the respondent agreed to settle as per the terms set out, including para. 4, which states that the appellant shall have no claim or entitlement whatsoever towards any insurance claimed received by the respondent from their insurer for his motorcar. The respondent argues that the action by Progressive Insurance through the appellant herein against the respondent fails since, entering into the settlement, the appellant cannot pass on what he does not possess in fact and law.

[26] The settlement does not remove the appellant's subrogation rights because Progressive Insurance has stepped into his position to claim. The appellant had subrogated his rights to Progressive Insurance on 27 July 2018 before he accepted the settlement letter. Under equity, Progressive Insurance must be compensated for the payments made to the appellant under subrogation, where the respondent's insurer would indemnify the appellant's insurer for the total loss of his motorcar.

[27] The respondent's other argument is where the appellant failed to prove the respondent's negligence because of the accidental fire, which could not make the respondent liable in any way. I find this argument lacks merit because the respondent received compensation from its insurance coverage policy regarding the accidental fire. The subrogation laws clearly state that the insured is to be indemnified for all payments made by the insurer to the insured from the third party. In the plethora of cases mentioned in *Tiong Nam Trading & Transport (M) Sdn Bhd v. Commercial Union Assurance (Malaysia) Sdn Bhd* [2008] 6 CLJ 160; [2008] MLJU 494, when goods which their owner has insured are lost or damaged, the insurers on payment are subrogated to the owner's remedy against any carrier, warehouseman or other bailee responsible for the safety of the goods entitled to recover the whole loss from the carrier or bailee who is liable to the owner irrespective of their liability to the insured insurance company (see *Mobile and Montgomery Railway Company v. LC Jurey And M Gillis, Partners as Jurey & Gillis, for the Use of the Factors' & Traders' Insurance Company of New Orleans* (1883) United States Supreme Court Reports 28, Law Ed US 110-113, at 584-597 [1877] 5 Ch D 569, CA and the *Hall & Long v. The Railroad Companies* (1871) Supreme Court of the United States, 13 Wall 367; 80 US 367; 20 L Ed 594; 1871 US Lexis 1348).

[28] In *Economic Transport Organization v. Charan Spinning Mills (P) Ltd* [2010] 3 MLJ 1347 (SC) (Madras Law Journal), the Supreme Court of India referred to various decided cases. It elucidated the differences at pp. 1357 and 1359:

12. ...

The concept of subrogation was explained in the following manner by Chancellor Boyd in *National Fire Insurance Co v. McLaren* 1886 (12) OR 682:

> The doctrine of subrogation is a creature of equity not founded on contract, but arising out of the relations of the parties. In cases of insurance where a third party is liable to make good the loss, the right of subrogation depends upon and is regulated by the broad underlying principle of securing full indemnity to the insured, on the one hand, and on the other of holding him accountable as trustee for any advantage he may obtain over and above compensation for his loss. Being an equitable right, it partakes of all the ordinary incidents of such rights, one of which is that in administering relief, the Court will regard not so much the form as the substance of the transaction. The primary consideration is to see that the insured gets full compensation for the property destroyed and the expenses incurred in making good his loss. The next thing is to see that he holds any surplus for the insurance company's benefit.

In *Banque Financiere de la Cite v. Parc (Battersea) Ltd* 1999 (1) A.C.221, the House of Lords explained the difference between subrogations arising from the express or implied agreement of the parties:

> ... there was no dispute that the doctrine of subrogation in insurance rests upon the parties' common intention and gives effect to the principle of indemnity embodied in the contract. Furthermore, your Lordships drew attention to the fact that it is customary for the assured, on payment of the loss, to provide the insurer with a letter of subrogation, being no more nor less than an express assignment of his rights of recovery against any third party. Subrogation, in this sense, is a contractual arrangement for the transfer of rights against third parties and is founded upon the parties' common intention. But the term is also used to describe an equitable remedy to reverse or prevent unjust enrichment which is not based upon any agreement or common intention of the party enriched and the party deprived. *The fact that contractual subrogation and subrogation to prevent unjust enrichment both involve transfers of rights or something resembling transfers of rights should not be allowed to obscure the fact that one is dealing with radically different institutions. One is part of the law of contract and the other part of the law of restitution*.

Ltd. v. Nelson Line (Liverpool) Ltd. (No. 1) 1906 (2) KB 217:

> How the underwriters come in is only by way of subrogation to the assured's rights. Their right is not that of assignees of the cause of action. Therefore, they could only be entitled by

A subrogation to the plaintiffs' rights. What is the nature of their right by way of subrogation? It is the right to stand in the shoes of the persons whom they have indemnified, and to put in force the right of action of those persons; but it remains the plaintiffs' right of action, although the underwriters are entitled to deduct from any sum recovered the amount to which they have
B indemnified the plaintiffs, and although they may have provided the means of conducting the action to a termination. It is not a case in which one person is using the name of another merely as a nominal plaintiff to bring an action in which he alone is really interested; for the plaintiffs here have real and substantial interest of their own in the action.
C

The difference between assignment and subrogation was also explained by the Madras High Court in *Vasudeva Mudaliar v. Caledonian Insurance Co.* AIR 1965 Mad. 159 thus:

In other words arising out of the nature of a contract of indemnity,
D the insurer, when he has indemnified the assured, is subrogated to his rights and remedies against third parties who have occasioned the loss. The right of the insurer to subrogation or to get into the shoes of the assured, as it were, need not necessarily flow from the terms of the motor insurance policy but is inherent in and springs from the principles of indemnity.

E Where, therefore, an insurer is subrogated to the rights and remedies of the assured, the former is to be more or less in the same position as the assured regarding third parties and his claims against them founded on tortuous liability in motor accidents. *But it should be noted that the fact that an insurer is subrogated to the rights and*
F *remedies of the assured of the assured does not ipso jure enable him to sue third parties in his own name. It will only entitle the insurer to sue in the name of the assured, it being an obligation of the assured to lend his name and assistance to such an action*. By subrogation, the insurer gets no better rights or no different remedies than the assured himself. *Subrogation and its effect are therefore, not to be mixed up with those of a*
G *transfer or any assignment by the assured of his rights and remedies to the insurer. An assignment or a transfer implies something more* than subrogation, and vests in the insurer the assured's interest, rights and remedies in respect of the subject matter and substance of the insurance. In such a case, therefore, the insurer, by the transfer or assignment in his favour, will be able to maintain a suit in his own
H name against third parties.

14. Subrogation, as an equitable assignment, is inherent, incidental and collateral to a contract of indemnity, which occurs automatically when the insurer settles the claim under the policy by reimbursing the entire loss suffered by the assured. Any writing need not evidence it. But, where the
I insurer does not settle the claim of the assured fully, by reimbursing the entire loss, there will be no equitable assignment of the claim enabling the insurer to stand in the shoes of the assured, but only a right to recover from the assured, any amount remaining out of the compensation

recovered by the assured from the wrongdoer, after the assured fully recovers his loss. To avoid any dispute with the assured as to the right of subrogation and extent of its rights, the insurers usually reduce the terms of subrogation into writing in the form of a Letter of Subrogation which enables and authorizes the insurer to recover the amount settled and paid by the insurer, from the third-party wrong-doer as a Subrogee-cum-Attorney. When the insurer obtains an instrument from the assured on settlement of the claim, whether it will be a deed of subrogation or subrogation-cum-assignment, it would depend upon the intention of the parties as evidenced by the document's wording. The title or caption of the document, by itself, may not be conclusive. It is possible that the document may be styled as 'subrogation' but may contain, in addition, an assignment concerning the balance of the claim. In this event, it will be a deed of subrogation-cum-assignment. It may be a pure and simple subrogation but may inadvertently or, by way of excessive caution, use words more appropriate to an assignment. If the terms clearly show that the intention was to have only a subrogation, use of the words "assign, transfer and abandon in favour of' would in the context be construed as referring to subrogation and nothing more.

See also: DRS Logistics Private Limited, Represented by its *Director Dinesh Agarwal v. Blue Star Limited And Another* [2017] 4 MLJ 120 (Madras Law Journal) at paragraph 10 to 12; *Canadian Imperial Bank of Commerce v. Home Insurance Co.,* [1984] N.S.J. No. 63 at paragraph 19; *Dwyer v. Liberty Insurance Co. of Canada* [2002] N.J. No. 344 at paragraph 36 to 42.

(emphasis added)

Whether There Is A Bailment Contract Between Parties?

[29] The respondent's argument that there is no bailment contract falls back on the discrepancy with the SOC, where it was merely pleaded that his motorcar was sent to the premises for service without the details of where, when, and how. Subsequently, the appellant changed his story in court and said he sent for repairs. This departure from the pleadings shows the appellant's failure to dispense the burden of proof under s. 101 of the EA 1950. The appellant is said to have failed to show any binding contract between parties since the repair approval was only secured after the fire.

[30] I find this argument without merit. The police report by the respondent's manager (SD2) reported that his motorcar was one of the burnt vehicles at the premise (exh. P1). Various documents were produced including the vehicle damage inspection report (adjuster report) (exh. P3), the letter dated 29 March 2018 on the fire damage to his motorcar situated at the premise (exh. P9), the letter dated 20 April 2018 from Progressive Insurance to the appellant and the letter of settlement for his motorcar (exh. D11) confirmed his motorcar was burnt in the fire at the premise. The evidence shows that his motorcar was at the premise before the fire. When his motorcar was sent to the premises for service or repairs, it was handed over to the respondent for actions to be taken by the respondent on his motorcar. A contract of bailment exists since the parties' conduct mirrored

A that of a bailment. A bailment is a delivery of goods by one person to another for some purpose upon a contract that they shall be returned or disposed of when the purpose is accomplished. The person delivering the goods is the bailor, and the person to whom they are delivered is the bailee.

B **[31]** Lord Holt in *Coggs v. Bernard* (1703) 2 Ld Raym 909 held that "bailment is the delivery of a chattel in trust, upon a contract expressed or implied, that the trust shall be reposed in the bailee, and the chattel redelivered by him to the bailor, according to the purpose of the trust. It reduces the complex nature of bailment to its essential components: that there must be a delivery of a thing, a trust reposed upon the bailee, and a C subsequent redelivery of the thing to the bailor according to the trust's purpose."

[32] The governing laws on bailment would be the Contracts Act 1950 ("CA 1950"), particularly s. 101, which defines bailment, bailor, and bailee. Sections 102, 104, 105, 113 and 114 of the CA 1950. If a person possessing D the goods of others contracts to hold them as a bailee, he becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered through bailment (s. 101 of the CA 1950). The general elements essential for forming a bailment contract are:

E (i) parties must clearly intend to enter into a bailment agreement. The agreement's purpose should be explicitly stated, whether for safekeeping, transportation, repair, or any other specified purpose related to the temporary transfer of possession of goods. The relationship between a bailor and a bailee creates a contract in which assets or property are transferred from the bailor to the bailee. The F essential components of a legally binding contract must be present, including acceptance and consideration. The bailee's express or implied acceptance of possession and control over the property is a significant requirement for forming a bailment contract. Since bailment is a contract, its enforcement depends on the parties' understanding and G agreement to its provisions. Consideration involves the exchange of something valuable for there to be a valid contract. Its enforcement depends on the parties' understanding and agreeing to its provisions. This constitutes a good consideration, provided one party forfeits something of value. It suffices that the bailor relinquishes the use of the H property after giving the bailee control over it; the bailor has, therefore, forfeited something valuable, which is the immediate right to use the property;

(ii) there must be an actual or constructive delivery of the bailed goods from the bailor to the bailee. The bailor transfers physical possession of the I goods to the bailee, or the bailee somehow gains control or access to the goods with the bailor's consent (s. 102 of the CA 1950). Actual delivery

entails the physical delivery of the items by the bailor to the bailee. In a constructive delivery, the items are not expressly delivered to the bailee, but steps are taken, which may imply that the bailee is given possession of the goods rather than being outrightly delivered, for example, the delivery of a title document or a car's key;

(iii) property is transferred from the bailor to a bailee for a specific purpose without the actual transfer of ownership. An agreement outlining their obligations and responsibilities must exist, and the bailment must have a specific purpose, be clearly defined, and always be legal;

(iv) the bailee has the right to own the property but not to use or transfer it to others. The bailor retains legal ownership of the property while it is in the bailee's possession;

(v) the goods transferred by the bailor to the bailee are transferred based on the condition that they will be returned in their original form or an altered form or disposed of following the directors of the bailor;

(vi) the bailor and the bailee must have the legal capacity to enter into a contract. This means they must be of sound mind, of legal age, and not under any legal disability or incapacity that would prevent them from understanding the terms and obligations of the bailment agreement; and

(vii) the terms and conditions are unambiguous and lay down the rights, duties, and responsibilities of both the bailor and the bailee, including details on the care, use, storage, and return of the bailed goods, any limitations of liability, insurance requirements, and dispute resolution mechanisms.

[33] Bailments are characterised by the different circumstances and duties owed by the parties involved. Some of the common types of bailments mentioned by Worluh-Okolie *et al* (2024) are bailments benefiting the parties that are often referred to as a 'mutual-benefit bailment; bailments benefiting only the bailor where the bailment only benefits the bailor are often referred as a "gratuitous bailment or a "bailment for the benefit of the bailor"; bailments that only benefit the bailee are where the bailments are for the sole benefit of the bailee as the bailee receives the sole benefit, and the bailor does not receive any compensation for the bailment. The bailee owes a duty of care, which means they must not be slightly negligent in caring for the bailed goods (s. 104 CA 1950). In this kind of bailment, the bailee is liable for practically any damage done to the bailed property. This last type of bailment category requires the highest standard of care. Where a bailee cannot produce the asset or property by the end of the arrangement, the bailor has the right to terminate the agreement and initiate legal action, which may include compensating for damages. On the other hand, bailees have the

A right to demand payment for their services when the bailor fails to pay. The bailment contract between the appellant and the respondent falls under this last bailment category that only benefits the bailee. The appellant sent his motorcar for service/repair, which benefited him only when his motorcar was supposed to be in better condition upon collection.

B **[34]** The bailor is the owner of the goods that are the subject of the bailment. In a bailment contract, the bailor has certain rights to claim against the bailee, including the right to demand return, compensation, and termination. The bailor also has the right to claim damages for unauthorised use and the right to claim for any gain on the goods bailed. The bailor is C responsible for disclosing defects and compensating the bailee for expenses incurred. In a bailment contract, the bailee does something for the bailor upon his instructions. The bailor will compensate the bailee's expenses while performing his part. The bailor must pay the due remuneration to the bailee for rendering his services. The bailor must compensate the bailee for any loss D or damage he may suffer due to the bailor's conduct. In cases where the bailor asks for the return of goods even before the expiry, if the bailee suffers from any loss, the bailor must compensate the bailee for the same. The bailor may be required to indemnify the bailee against any third party.

[35] The bailee is the one to whom the goods are transferred for some E particular purpose. The bailee has the right to possess and use the bailed goods for the specified purpose as agreed upon in the contract. The bailee is entitled to compensation for any expenses incurred while caring for the bailed goods, provided such expenses were necessary and reasonable. In some cases, the bailee may have a right to retain possession of the bailed F goods until payment for services rendered or expenses incurred. The bailee must exercise reasonable care and diligence in handling, storing, and protecting the bailed goods where the bailee has the duty to return and to account: The bailee must keep accurate records of the bailed goods and their condition, especially if they are perishable or high-value. A bailee's G liabilities include negligence, where the bailee may be held liable for any damage, loss, or depreciation of the bailed goods resulting from their negligence, improper use, or breach of duty. Also, liability for unauthorised use occurs if the bailee uses the bailed goods for a purpose other than what was agreed upon.

H **[36]** The existence of a bailment contract between the parties renders the respondent a bailee owing a duty of care for his motorcar at the premises. His motorcar would not have suffered a total loss without the accidental fire. If the respondent had exercised a reasonable duty of care to the motorcars at the premise, including his motorcar, the motorcars, including his I motorcar, could have been salvaged. There was no proof to show that the respondent had dispensed its duty of care in taking all reasonable and/or

precautionary steps to prevent the fire from spreading to the premise to salvage the vehicles. Sections 104 and 105 of the CA 1950 mandates the respondent to take as much care of his motorcar (the bailed good) where the respondent would not be responsible for the loss of the thing bailed if the respondent had taken the amount of care of his motorcar described (s. 104 of the CA 1950).

[37] In *China Insurance Co Ltd v. Ang Bay Kang* [1968] CLJU 22; [1968] 1 LNS 22; [1969] 1 MLJ 142 FC, it was mentioned that: "every motor car owner who sends his car to the garage for repairs wants to be sure that it is in good running order when he receives it back, and for this purpose, he gives either directly or by implication, authority to the garage proprietor to test the car ..." Thus, the respondent, as bailee, has a duty of care to ensure the good surrendered by the bailor (the appellant) is returned to the appellant like before. Despite the accidental fire, the respondent's duty was not discharged but remained to ensure that his motorcar was saved so that it could be brought back to him in the same condition as before, if not better, with the scheduled repairs. The respondent was proven negligent when he failed to show any precautionary steps to prevent his motorcar from being burnt in the fire. There is no proof to show what action the respondent took to ensure the delivery of his motorcar.

Decision

[38] I find there is a cause of action under the laws of subrogation. I also found a bailment contract between parties when the respondent sent his motorcar to the premises to be serviced or repaired. The surrendering of his motorcar was equivalent to a bailor-bailee relationship.

[39] Under subrogation, the appellant's insurer can claim for the sums paid to the appellant as insured for the loss of his motorcar under the insurance law. The appellant is not required to prove the respondent's negligence as the extent of liability for the claim under subrogation. Nonetheless, with a bailment contract, the respondent is responsible for returning his motorcar better (with the service or repair made) or as before it was given at the premise.

[40] Since the respondent failed to return his motorcar, the respondent is obligated under subrogation to pay back the appellant's insured, to indemnify by paying back the appellant's insurer of the total loss of his motorcar of RM72,000 together with all incidental expenses of RM394.50 costs of adjuster's fee. With that, this appeal is allowed with costs.